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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1288

ALFRED DUNHILL OF LONDON, INC.,

Petitioner,

—against—

THE REPUBLIC OF CUBA and DANIEL SOLANO PINERA, As Interventor,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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The respondents, Republic of Cuba and Daniel Solano Pinera, as Interventor, oppose the granting of a petition for certiorari in this matter for the following reasons:

1. The petition for certiorari seeks consideration of a question passed upon by this Court in *Banco Nacional* v. *Sabbatino*, 376 U.S. 398, 415, fn. 17 (1964). It is clear from that decision that the Court will not inquire into the degree of formality with which an act of state is expressed. Applying the test held proper in the second paragraph of that footnote, we would have to inquire whether the Cuban courts would recognize the legitimacy of the debt in question here. The answer is as clearly in the negative in this case

as it was in the *Sabbatino* case. And, see *French* v. *Banco Nacional*, 23 N.Y.2d 46 at 65 (1968).

2. Furthermore, the petition is based on a serious distortion of the record and on a consequent misstatement of respondents' position.

First, petitioner (Pet. p. 3) materially misstates the nature of the holding by the district court in *Palicio* v. *Brush & Bloch*, 256 F.Supp. 481 (S.D.N.Y. 1966), aff'd, 375 F.2d 1011 (2nd Cir. 1967), cert. den., 389 U.S. 830 (1967). In that case the district court decided that the respondents could recover for post-intervention shipments but it did not pass upon "the question of who was entitled to pursue claims for the price of cigars shipped . . . before the intervention . . ." (J.A. 43a). The Court of Appeals agreed (J.A. 10a). That issue, the right to payment for pre-intervention shipments, was before the court in this case and it was extensively litigated.

From its faulty premise, petitioner goes on to assert that respondents had, in this case, denied receipt of the payments for pre-intervention shipments. Indeed, at p. 3 of the petition, such denial is characterized as "interventors' principal line of defense." The Cuban government's alleged "failure to act" was, says petitioner, consistent with this defense (Pet. p. 5).

But respondents never denied receipt of the payments, and the record seems clear that a large portion of the payments were, in fact, received. Respondents merely stated to the court the fact that their records of the 1960 transactions were incomplete and that they could not either affirm or deny receipt of the funds (J.A. 22a, 46a.).[1] The fact

1. We must recall that the events which gave rise to this lawsuit took place in the midst of a revolution in Cuba, and the loss or destruction of the records of commercial transactions is not particularly surprising.

that the records were lost was not respondents' "principal line of defense." It was merely an argument which sought to shift the burden of proof of payment to the importers. The district court held that the importers had sufficiently proven that they had paid the funds in question to the interventor and that the interventor had received those monies; the respondents disagreed with that conclusion, but, on appeal, the Court of Appeals affirmed the decision of the lower court and there is no further issue as to this matter.

The respondents did, however, have serious substantive grounds for contesting their liability. They argued that even if they had received the payments, the payments were not recoverable in this suit because (1) the nationalization of the owners' property included the nationalization of the owners' accounts receivable, and hence the interventor was entitled to the payments in question (J.A. 47a, 48a); and (2) in any event, the Act of State doctrine was a complete defense.

3. We must initially note that this is not a case like *Oetjen* v. *Central Leather Co.*, 246 U.S. 297 (1918) or *Ricaud* v. *American Metal Co.*, 246 U.S. 304 (1918), in which the foreign state whose act was alleged as a defense was not a party to the action. In such cases, obviously, some degree of formality might reasonably be required to enable a third party to plead act of state.[2] *French* v. *Banco Nacional*, supra at 66, fn. 1. But here, the Republic of Cuba is a party to the suit. For seven long years it has been asserting that its repudiation of the debt was its act of state. That assertion was made in the district court, in the court of appeals and is now being made in this Court. It has been and is being made by counsel, which is the way a party litigant makes known its legal position in our

2. It will be noted that even in many of these cases, the act of state found to be binding was, to put it mildly, informal.

judicial system. The reason for the assertion of the defense of act of state—whether it be because of Cuba's view of the law, or considerations of its own public policy—is not relevant. The courts have never inquired into the reasons for the assertion of an act of state defense.

4. Petitioner places heavy reliance on *Compania Espanola de Navegacion Maritima* v. *The Navemar*, 303 U.S. 68 (1938), which is cited for the proposition that the statement of an ambassador is not "evidence of a sovereign act" and hence the statement of counsel is not (Pet. p. 6). Petitioner misreads the case. The issue there was whether, in fact, the government of Spain had ever taken possession of The Navemar while it was at Rosario or Buenos Aires, Argentina. The Spanish government, speaking through its Ambassador, contended that it had taken possession of the ship in one of those ports; the record showed no such act by the Spanish government. The issue in that case was not whether the Court would accept the statement of the Ambassador as a statement of the government, but rather whether the statement of the government, as asserted through the Ambassador, was in fact supported by the record. The Court found that it was not.[3]

Finally, it will be noted that the issue in *The Navemar* was whether sovereign immunity applied and not act of state. There could have been no act of state defense made because, as we have noted, the act in question was alleged to have taken place outside the territory of Spain.

5. Petitioner argues (Pet. p. 9) that the decision of the court below obliterates the difference between the act of state doctrine and sovereign immunity, thus destroying the restrictive nature of the latter doctrine.

3. The Court will recall that the facts giving rise to *The Navemar* litigation arose in the midst of the Spanish Civil War, at a time when there was much doubt as to who was the Spanish government.

There is no doubt that the doctrines of sovereign immunity and act of state are related and that at times they overlap. There are many cases in which sovereign immunity is a defense and act of state would not be. For example, *Spacil* v. *Crowe*, 489 F.2d 614 (5th Cir., 1974). There are other cases in which the converse is true. *French* v. *Banco Nacional, supra; Oetjen* v. *Central Leather Co., supra; Ricaud* v. *American Metal Co., supra.* And there may be still other situations in which either defense would be available.

But the difference between the doctrines still exists and the decision of the court below does not erase that difference. For example, sovereign immunity is available only to the sovereign and may be restricted in its nature;[4] the act of state defense is available only as to acts done within the territory of the state.

Petitioners' analysis makes little sense since it seems to admit that if some Cuban government agency had enacted a decree saying "we hereby repudiate this debt," all of the dire consequences considered at page 9 of its petition would have followed anyhow. The requirement of such a pro forma decree is precisely the "formality" which this Court rejected as unnecessary in *Sabbatino, supra*, p. 1.

6. Petitioner makes reference to *Bank of Boston* v. *Banco Nacional*, 61 Civ. 2116 (S.D.N.Y.) (decision pending), and it is true that the decision of the Court of Appeals here may have a decisive effect on that case. But it is *not* true, as petitioner suggests (Pet. p. 9), that the defendant

4. Compare the "Tate Letter," 26 U.S. State Dept. Bulletin 984 (1952) and *Victory Transport* v. *Comisaria General*, 336 F.2d 354 (1964), with *Rich* v. *Naviera Vacuba*, 295 F.2d 24 (4th Cir. 1961) and *Spacil* v. *Crowe, supra.* Actually this Court has never passed on the State Department position as expressed in the Tate Letter, although, as the cases cited indicate, the State Department itself ignores the Tate Letter when it seems politically advisable.

in that case belatedly raised the act of state defense. Actually, the defense was pleaded in its answer and was argued to the court both in pre-trial and post-trial briefs, and in oral argument.[5]

7. A final note. If an act of state doctrine was not available to respondents, the result would be same. As the Court of Appeals pointed out (J.A. 24a), the obligation on which petitioner sues was quasi-contractual in nature; it arose in Cuba, and its situs was in Cuba. Accordingly it would be governed by Cuban law in any event. There can be little doubt that in the circumstances of this case Cuban courts would hold for the respondents.

Respectfully submitted,

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5. Petitioner, at page 9, misquotes a letter from Judge Bryan. Judge Bryan did not say that the act of state issue was not covered in the briefs of the parties; what he said was that the impact of the decision of the Court of Appeals in this case was not covered in the briefs of the parties, which was "quite understandabl[e]" because the decision here came down a year after the briefs in the *Bank of Boston* case were submitted.